

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
E L. X) OAH No. 19-0986-SAN
) Agency No.
_____)

DECISION

I. Introduction

E L. X is the father of D X, a minor. On July 12, 2019, Mr. X and D had an altercation where Mr. X punched D in the face. D, several hours after the incident, was diagnosed with a concussion. Following the incident, the Office of Children’s Services (OCS) became involved with the family. OCS subsequently substantiated an allegation of child maltreatment, specifically physical abuse, against Mr. X.

After a hearing and based upon a review of the evidence, this decision concludes that Mr. X more likely than not physically abused D by punching him, which then caused D to be physically injured. OCS has therefore met its burden of proof and shown that the substantiated finding of physical abuse should be upheld.

II. Procedural History

This case was initiated by OCS making a substantiated finding of physical abuse against Mr. X. Mr. X requested a hearing to challenge the substantiated finding. A telephonic hearing was held on February 26, 2021. Mr. X was represented by Gary Stapp. Mr. X testified. OCS was represented by Assistant Attorney General Brian Starr. K J, an OCS protective services specialist, who worked on this case as a family services worker, testified for OCS.

III. Facts

D is E X’s son. At the time of the July 12, 2019 incident that underlies this case, he was 15 years old, just days away from his 16th birthday. D was working for his father’s excavating business, which involved him operating heavy machinery. In the period preceding July 12, 2019, D was not an ideal child. His school grades were poor, he was sneaking out of the house, and he was drinking and smoking marijuana. He was also having problems with staying awake on the job site.¹

¹ Mr. X’s testimony; D’s testimony.

OCS had D interviewed at Building A in City A on August 9, 2019. During that videotaped interview, D stated the following:

- There were several incidents preceding that July 12 incident where his father has punched him and slammed him against a wall and the side of the truck.
- On July 12, he was working on a job site with his father. His father was operating a bulldozer, and D was checking the grade to make sure it was level.
- The owner's girlfriend was talking to him.
- His father got out of the bulldozer, came over to D, and grabbed him.
- D said "I f...ing quit," whereupon his father started hitting him. He hit him with his closed fist six or seven times to the side of D's head. D ended up grabbing his father's shirt, and his father threw him on the ground. His father had one leg on top of him.
- His father then picked him up and told him to "start walking."
- D called his mother and his girlfriend. He went to his mother's work, which was nearby.
- D told his mother that he was in pain. She was scared to take him to the doctor's and waited six to seven hours later to take him to see a doctor. She also had him lie to the doctor about what happened.
- His mother kept changing the story about what happened and telling him that he deserved it.
- He left the family home that day. He stayed at his older brother's home for less than a day and then went to stay at his girlfriend's home. He spent two weeks there and then went back to his own home. He was verbally ganged up on by everyone and, blamed for the incident.²

D, at hearing, testified several times that the statements he made in the interview were true.

B is D's younger brother. He was also interviewed at Building A in City A on August 9, 2019. In his interview, he stated that he was told by his mother and brother that D had a fight with their father, which was why D was not living with the family. He also described the altercation, as was told to him by his mother and brother. He did not personally witness the altercation.³

² Ex. 11.

³ Ex. 12.

G Q is the girlfriend of the property owner. She witnessed the entire altercation. She was interviewed by the City A Police Department on August 9, 2019. That interview was recorded. In it, she said that Mr. X started screaming at D, that Mr. X jumped out of the equipment he was operating, came over to D, started holding D by the throat, and started throwing punches at D. She said that it took D a while to punch back. She described Mr. X's hitting D as a punch directly to the face.⁴ F P, the property owner, was also interviewed by the police on August 9, 2019. In his recorded interview, he said that he did not see the beginning of the altercation, but that as he drove up to the property, he saw Mr. X and D on the ground, and that it looked as though they were wrestling.⁵

Mr. X's testimony about the incident did not appreciably differ from D's interview statements. He stated he was on the other side of the property from D, about 75 to 100 feet away. He was very frustrated angry with D and got out of the bulldozer he was operating and walked over to where D was to remonstrate with him. Mr. X grabbed D's shirt. They were face to face, about three inches apart, and Mr. X and D were yelling at each other. D was holding the grade stick (used to determine leveling) in his right hand; his left hand was at his side. D "puffed" up his chest and Mr. X thought that D was going to hit him. Mr. X did not allow that to happen and punched D in the chin. Mr. X testified that he only hit D once, that D then tried to tackle him, and that because he was concerned that they would fall onto the blade of the bulldozer, that he tripped D whereupon they ended up on the ground.⁶

Of note, Mr. X is 49 years old, 6 feet tall and weighs about 50 more pounds than D.⁷ D was just shy of 16 years old, slightly under 5 feet 9 inches tall, and weighed 122 pounds.⁸

Following the altercation, D walked to his mother's workplace, which was nearby. She initially did not want to take him to the doctor. Later that day, at 5:00 p.m., she took him to the Clinic A, where he was diagnosed with a concussion and CT of his head was ordered. At the clinic, D said that he was injured when he fell off a tractor at approximately 10 a.m. that day, striking his head on metal tracks. The CT scan results were normal.⁹ D testified that he lied at the clinic about the accident, because his mother was concerned that he might get his father into

⁴ Ex. 16.

⁵ Ex. 15.

⁶ Mr. X's testimony.

⁷ Mr. X's testimony.

⁸ AR 48.

⁹ AR 41 - 42.

trouble, although she did not directly instruct him to lie. D returned to the clinic on July 15, 2019 because his symptoms had gotten worse.¹⁰

After the July 12 incident, D left his parent's home. He initially planned to stay with his older brother. That lasted for less than one day. D then moved to his girlfriend's home. After about two weeks, D went back to his home, where his father would not look at him or speak to him. D reported the July 12 incident to the City A Police Dept. on August 5, 2019 because he did not want to stay with his family. After speaking to D, and Mr. and Ms. X, the City A Police Dept. referred the matter to OCS for its action.¹¹ OCS then had D and B interviewed as described above.

OCS's involvement with the family escalated. It removed both D and B from the home. Both have since returned home. OCS in the meantime, notified Mr. X on September 3, 2019, that it was making a substantiated finding that he had physically abused D.¹² Ms. J is the OCS caseworker who worked on the family reunification process. She spoke to Mr. and Ms. X about the July 12 incident. Mr. X told her that he hit D because D looked like he was going to hit him and that Mr. X was not going to allow anyone to hit him first.¹³

D's hearing testimony was that the statements he made in the interview were true. He stated that he did not make any threatening gestures towards his father, but that he did not think his father would have hit him if he had not "puffed" up and yelled at him. He further stated that although he thought at the time that he had been physically abused by his father, he no longer thought so, and said that he and his father had a rocky relationship and that he screwed up.¹⁴

IV. Discussion

A. Legal framework

OCS maintains a child protection registry.¹⁵ Those reports are confidential but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.¹⁶ At the conclusion of an investigation, OCS may find that an allegation has been substantiated. A substantiated finding is one where the

¹⁰ AR 46 – 47.

¹¹ D's testimony; AR 11 – 12.

¹² AR 1 – 2.

¹³ Ms. J's testimony.

¹⁴ D's testimony.

¹⁵ AS 47.17.040.

¹⁶ AS 47.17.040(b).

available facts gathered from the initial assessment indicate that more likely than not, a child has been subjected to maltreatment under circumstances that indicate the child’s health or welfare is harmed or threatened.¹⁷

Alaska’s Child Protection statute, AS 47.17, defines “child abuse or neglect” to mean “physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate the child’s health or welfare is harmed or threatened thereby[.]”¹⁸ The statute then defines one of these terms – “maltreatment” – to mean “an act or omission that results in circumstances under which there is reasonable cause to suspect that a child may be a child in need of aid,” as defined under the separate Child in Need of Aid (CINA) statute, AS 47.10.011.¹⁹

Under AS 47.10.011(6), a child can be found to be “in need of aid” under the CINA statute if “the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child’s parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately.”²⁰

When a parent challenges a substantiated finding of abuse or neglect under the Child Protection statute, OCS has the burden of proving that the substantiation should be upheld. This burden has both a factual and a legal component. That is, OCS must prove as a matter of fact that certain conduct occurred, and as a matter of law that the conduct warrants a substantiated finding.²¹ OCS substantiated maltreatment by Mr. X. Its notice, and the agency record demonstrated that it was substantiating maltreatment that was comprised of Mr. X physically injuring D. OCS’s burden is therefore to prove that Mr. X maltreated D by causing him to experience substantial physical harm.

B. Evidentiary issues

In an administrative proceeding under AS 44.64.060, “[t]he administrative law judge may admit any evidence of the type on which reasonable people are accustomed to rely in the conduct

¹⁷ OCS Child Protection Manual, CH. 2.2.10.1 (Rev. 5/16/15), *available at*: <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

¹⁸ AS 47.17.290(3).

¹⁹ AS 47.17.290(9).

²⁰ AS 47.10.011(6).

²¹ *Matter of E.O.*, OAH No. 16-1407-SAN (Commissioner of Health & Soc. Svcs 2017).

of serious affairs.”²² The rules of evidence used in the judicial system “do not apply to an administrative hearing except as a guide[.]”²³ Hearsay is admissible. Here, the non-testimonial evidence is comprised chiefly of the written police report, D’s medical records, the audio recordings of two police interviews (G Q and F P), the forensic interviews of D and B, and the caseworker’s contemporaneous notes.

Mr. X objected to all of the documentary evidence and the audio/video interviews as hearsay, although at closing the objection to the D’s Building A interview was withdrawn. Consequently, the nature of the non-testimonial evidence raises several evidentiary issues that require attention.

1. Forensic Interviews

There are two forensic interviews.²⁴ Mr. X withdrew his objection to D’s interview in his closing statement. Regardless, D’s interview statements are not hearsay because he ratified those statements at hearing: “[i]f the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem.”²⁵

Mr. X did not withdraw his objection to B’s interview. In judicial proceedings, it would be necessary to conduct a strict admissibility analysis to determine whether these hearsay statements were admissible. Here, however, the question is far simpler: whether the interviews are the type of evidence upon which reasonable people would rely in the conduct of serious affairs. The answer to that question is plainly yes. The recorded interviews are the product of a formalized and well-recognized process for investigating alleged harm to children. There can be no doubt that they are admissible in an administrative proceeding.

Separate from admissibility, there remains a question as to the weight the interviews should be given. D’s interview will be given substantial weight. He testified at hearing, and in his hearing testimony, he stated several times that the information he provided during his interview was true. B’s interview will also be given a fair amount of weight. Although he was not an eyewitness to the incident, his statements were based upon what he was told by his mother and brother and corroborate D’s statements.

²² 2 AAC 64.290(a)(1).

²³ 2 AAC 64.290(b).

²⁴ See *Matter of A.S.W.*, 834 P.2d 801, 804 (Alaska 1992) (“The out-of-court statements of a child in proceedings where abuse is alleged are often quite necessary to the administration of justice.”)

²⁵ *Alaska Evidence Rules Commentary* Rule 801(d)(1).

In short, the forensic interviews are admissible in this proceeding because they readily satisfy OAH's evidentiary standard.

2. Hearsay from Ms. Q' and Mr. P's Recorded Statements to the Police

There are also two audio recordings from Ms. Q and Mr. P. The hearsay nature of these statements lessens their reliability. However, when taken as a whole, they are, for the most part, consistent with D's interview statements. There is no prohibition against hearsay in these proceedings, and the question is whether a reasonable person would rely on this information in the conduct of serious affairs. A reasonable person could rely on these recordings' information to supplement, explain, or otherwise contextualize other admissible evidence.²⁶

3. OCS Records

The bulk of the agency record consists of OCS's records that it gathered in the course of its investigation, including the police report, D's limited medical records, and its internal notes of the progress of the case, including statements made by individuals that it interviewed. The entire agency record is admitted. However, because the OCS employees who did the bulk of the interviews and investigation in this case were not available to testify, the agency record as a whole is given little weight. The exception to this are D's medical records, which were consistent with his testimony and his forensic interview.

C. The Evidence

The facts in this case are, for the most part, not in dispute. D's actions on the job site on July 12 upset Mr. X. Mr. X confronted him and put his hands on him. D "puffed up" his chest and Mr. X then punched him, because as Mr. X testified, he thought D was going to hit him. It might have been one punch; it might have been multiple punches. Mr. X testified it was one punch. Ms. Q said it was multiple punches before D started to respond. D said it was six or seven punches. Regardless, Mr. X, who is at least three inches taller than D and weighs approximately fifty pounds more, punched D. Then Mr. X tripped D and they ended up on the ground. Later that day, D sought medical attention where he was diagnosed with a concussion. The concussion symptoms were still continuing several days later as shown by his seeking follow-up medical attention on July 15.

²⁶ Cf. AS 44.62.460(d). While the Administrative Procedure Act does not apply in these proceedings, its approach to hearsay is instructive in considering what weight to give this evidence.

D. *Did Mr. X's Action In Punching D Constitute Physical Abuse?*

OCS can substantiate for physical harm to the children. Physical harm is statutorily defined as having caused physical harm to a child or a substantial risk of physical harm if the child is victim of a criminal assault (sexual and/or physical), or the unreasonable application of physical discipline resulting in some form of physical damage, or if there is some negligent act or omission by a parent that creates a substantial risk of injury to the child.²⁷

The facts of this case show that Mr. X approached D, grabbed him, punched him, and tripped him. D suffered a concussion as a result. This was physical harm. Mr. X attempted to show that the altercation did not cause D's concussion by referring to social media posts that D had made, before July 12, where D had someone slap him and at another time D smashed an empty beer can on his forehead.²⁸ However, given the fact that D sought medical attention, and was diagnosed with a concussion on the same day as the altercation demonstrates that it is more likely true than not true that but for Mr. X punching D and tripping him, the concussion would not have occurred. The concussion symptoms persisted several days, resulting in a follow-up medical visit on July 15. The evidence therefore shows that Mr. X physically harmed D.

The fact that Mr. X physically harmed D would mean that OCS has met its burden of proof to substantiate physical harm. Mr. X, however, argues that his actions constitute self-defense, parental discipline, or a combination of both.

1. Self-Defense

Self-defense can be asserted to defeat a substantiation of abuse or neglect claim.²⁹ In criminal law the prosecution has the burden to disprove this defense.³⁰ However, this is not a criminal case. It is a civil case where self-defense would be an affirmative defense, where Mr. X has the burden of proof. The facts of this case show that Mr. X initiated the physical contact with D by coming over to D, grabbing him, and then when D altered his physical stance by

²⁷ AS 47.10.015; AS 11.51.100.

²⁸ Mr. X and D's hearing testimony.

²⁹ The OAH case of *In Re UZ*, OAH Case No. 12-0422-SAN (Commissioner Health and Social Services 2013), held that self-defense was not available as a defense in substantiation cases. The decision is located online at the OAH website at [SAN120422 \(state.ak.us\)](https://www.oah.ak.us/SAN120422). However, the decision was overruled on appeal by the Superior Court, Superior Court Case No. 3AN-13-0 9124 Civil. The redacted Superior Court decision is available online at the OAH website at [SAN120422 Superior Court decision \(state.ak.us\)](https://www.oah.ak.us/SAN120422%20Superior%20Court%20decision).

³⁰ Self-defense is a defense in criminal law. See AS 11.81.330. A defense, as contrasted to an affirmative defense, places the burden of proof on the prosecution. See AS 11.81.900(b)(2) – affirmative defense and AS 11.81.900(b)(19) – defense.

“puffing” his chest, but making no other act, punching D. Mr. X was the initial aggressor.³¹ It should also be noted that Ms. J, an OCS caseworker who spoke to Mr. X, testified that Mr. X told her that he hit D first because he thought D was going to hit him and that Mr. X would not let anyone hit him first. If D had taken an overt act, then Mr. X’s argument would be more plausible. However, given the facts of this case, Mr. X’s self-defense assertion lacks any factual basis. Consequently, it is likely more true than not that Mr. X’s punching D was not self-defense.

2. Reasonable Parental Discipline

Alaska Statute AS 47.05.065(1) explicitly states that “parents have the following rights and responsibilities relating to the care and control of their child while the child is a minor: . . . (B) . . . the right to exercise reasonable corporal discipline.”³² While there appear to be a dearth of court cases referring to the parental discipline authorization contained in this statute, there are instructive criminal cases which refer to Alaska Statute which provides that a parent “[w]hen and to the extent reasonably necessary and appropriate to promote the welfare of the child . . . may use reasonable and appropriate nondeadly force on that child.”³³

The facts of this case show that it is more likely true than not true that Mr. X was acting in anger. He was upset with D. He got off the bulldozer. He walked over to D, a distance of 75 to 100 feet. He grabbed D, and then when D “puffed” up, he punched D. This was not a person who was disciplining a child. This was a person who was acting in anger. In the case of *Tipikin v. Municipality of Anchorage*, the Alaska Court of Appeals upheld Mr. Tipikin’s conviction for assaulting his stepdaughter, because “there was enough relevant evidence for a fair-minded juror to reasonably find that Tipikin slapped H. T., not because it was ‘reasonably necessary and appropriate’ to promote her welfare, but because he was angry.”³⁴ Because the facts show that Mr. X was acting in anger, he was not exercising parental discipline. Even assuming, solely for the purposes of argument, that Mr. X was exercising parental discipline, his actual physical acts exceeded the bounds of reasonableness, and as such, this is not a defense that is available to him.

³¹ If this were a criminal case, Mr. X, as the initial aggressor, would not be entitled to assert the defense of self-defense. AS 11.81.330(a)(3).

³² AS 47.05.065(1).

³³ AS 11.81.430(a)(1).

³⁴ *Tipikin v. Municipality of Anchorage*, 65 P.3d 899, 902.

E. Did OCS Meet Its Burden to Substantiate Physical Abuse?

As discussed immediately above, Mr. X's punching D and subsequently tripping him to the ground injured D to the point that D experienced a concussion for which he sought medical attention that same day, and for which the symptoms persisted for several days. Mr. X's actions did not constitute either self-defense or the exercise of reasonable parental discipline. And given that D experienced a concussion, Mr. X's actions directly caused him to experience substantial physical harm. OCS has therefore met its burden of proof and substantiated that Mr. X physically abused D.

V. Conclusion

The evidence in this case shows that Mr. X physically assaulted his son D on July 12, 2019, which resulted in him being substantially physically harmed. Consequently, OCS's substantiated finding that Mr. X physically harmed D is AFFIRMED.

Dated: March 18, 2021.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of April, 2021.

By: *Signed* _____
Name: Jillian Gellings
Title: Project Analyst
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]